ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re	)	
	)	
Implementation of Section 25	)	MM Docket No. 93-25
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

To: The Commission

COMMENTS OF TIME WARNER CABLE

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SUMMARY

Time Warner Cable, a division of Time Warner Entertainment Company, L.P., submits these comments in response to the Commission's January 31, 1997 Public Notice requesting updated public comment with respect to the implementation of Section 335 of the Communications Act of 1934 ("Communications Act"). Section 335 represents a broad grant of jurisdiction to the Commission to impose "public interest or other requirements for providing video programming" on direct broadcast satellite ("DBS") "providers," including entities that select, package and market programming over DBS facilities.

The minimum requirements expressly imposed by Section 335 -- the political broadcasting requirements of Section 335(a) and the 4-7 percent channel set-aside for noncommercial programming in Section 335(b) -- must apply to all DBS providers. However, Section 335(a) clearly grants the Commission the discretion to impose additional public interest obligations on providers of DBS service.

First, in order to determine appropriate "public interest or other requirements" for DBS providers beyond the statutory minimum, the Commission should undertake a thorough analysis of the public interest obligations imposed by federal law or regulation on cable television operators. Where it is determined that any such obligation continues to serve a vital public interest, then parallel obligations should be imposed on DBS providers. If not, such requirements should be lifted from cable operators. Second, where any DBS provider seeks the privilege to retransmit local television stations in a particular Area of Dominant Influence ("ADI") or Designated Market Area ("DMA"), such DBS providers should assume the same regulatory responsibilities attendant on cable operators in connection with the carriage of local broadcast stations. Third, where a DBS provider implements technology to offer differentiated programming on a regional basis, such DBS provider should shoulder

PEG access support obligations analogous to those imposed on cable operators, so as to "advance the principle of localism" under the Communications Act.

Equivalent Public Interest Obligations

The Commission, Congress, and DBS providers themselves have recognized that DBS is a direct competitor to traditional cable television service. For example, in its most recent annual report to Congress on competition in the video programming industry, the Commission named DBS as the chief competitor to cable, citing the steady growth in DBS penetration. Indeed, Preston Padden, President of Worldwide Satellite Operations for News Corporation Limited ("News Corp."), has called News Corp.'s proposed DBS venture a "wireless overbuild of the entire U.S. cable industry." Mr. Padden went on to boast that SKY will "deploy a cosmic armada unmatched since the Empire Struck Back" and that when SKY begins to retransmit local broadcast signals in the largest ADIs, "the cable guys will be calling for Dr. Kevorkian." Sen. John McCain called DBS "perhaps the most potent potential competitor to cable television. . . ."

It is beyond dispute that DBS providers have become direct competitors to cable television and have attempted to design a service which is essentially indistinguishable from cable television service. If a DBS provider is to function in much the same manner as a traditional cable operator, then regulatory parity and competitive neutrality dictate that such DBS provider be subject to the same regulatory requirements as a cable operator. The following regulatory restraints must either be lifted from cable or imposed on all DBS providers:

- **Access to Programming Requirements**
- **Channel Occupancy Limits**

- **Leased Access Requirements**
- **Regulation of Carriage Agreements**

Similarly, the Commission should undertake an exhaustive review of other public interest responsibilities and regulatory burdens imposed on cable operators, such as those concerning negative option billing practices, anti-buy-through, commercial limits on children's programming, emergency alert, protection of subscriber privacy and FCC regulatory fees, and either promulgate analogous requirements for DBS providers or relieve cable operators from such obligations.

Obligations Related To Broadcast Carriage

Certain DBS providers are actively seeking legislative changes to the Copyright Act to permit the retransmission of local broadcast signals. Substantial regulatory requirements are imposed on cable television operators in connection with the retransmission of such stations. Where a DBS provider seeks the benefits of local broadcast station carriage, such DBS provider should be required to assume the attendant regulatory responsibilities. Accordingly, the Commission should impose the following public interest and other obligations on DBS service providers that voluntarily elect to retransmit local broadcast signals throughout selected ADI/DMA areas:

- **Mandatory Broadcast Carriage Requirements**
- **Local TV Station Cross-Ownership Restrictions**
- **Network Nonduplication, Syndicated Exclusivity and Sports Blackout Requirements**
- **Must-Buy Obligations**

Promotion of Localism

Section 335 of the Act requires the Commission to examine the opportunities that the establishment of DBS provides for the "principle of localism" under the Communications Act. The 4 to 7 percent channel capacity set-aside, standing alone, will do nothing to foster the creation of additional local programming material. Accordingly, DBS providers which elect to function as a local outlet through the retransmission of local broadcast stations on a regional or ADI basis should be required to make contributions from their revenues to fund the creation of local educational and informational programming, commensurate with the PEG access support obligations imposed on those local cable operators with which the DBS provider competes.

FCC Jurisdiction Over Non-Licensees

Finally, the Commission clearly has jurisdiction over DBS service providers that are not themselves licensees. Section 335 of the Communications Act requires the Commission to recognize for regulatory purposes that DBS service is provided by the entity responsible for the selection, packaging and marketing of the actual Part 100 DBS program service delivered to consumers, not just the licensee responsible for the technical parameters of the Part 100 DBS satellite. Indeed, the express statutory language of Section 335 requires the Commission to impose on DBS "providers" certain public interest and channel set-aside requirements. The legislative history of Section 335 demonstrates that Congress understood and anticipated that the DBS provider might not necessarily be the DBS licensee, but rather, the entity that actually provides DBS service over DBS satellites directly to consumers.

As a practical matter, the statutory public interest obligations to be promulgated under Section 335 concern programming, not technical matters, and thus must be imposed on the

entity responsible for selecting and packaging the DBS programming in order to be effective. It simply makes no sense to impose the sole responsibility for meeting such obligations on a Part 100 DBS licensee which does little more than oversee the technical operations of the satellite and lease transponder space to the actual DBS service providers. At a very minimum, appropriate public interest obligations should be imposed on any DBS provider which is affiliated with a DBS licensee.

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To: The Commission

COMMENTS OF TIME WARNER CABLE

Time Warner Cable,[1] a division of Time Warner Entertainment Company, L.P., by its attorneys, submits these comments in response to the Commission's Public Notice, FCC 97-24, released January 31, 1997 ("Notice"), in the above-captioned proceeding. The Notice seeks to update and refresh the record in the Commission's proceeding to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] which added a new Section 335 to the Communications Act of 1934 (the "Communications Act").[3] As shown herein, Section 335 of the Communications Act represents a broad grant of jurisdiction to the Commission to impose "public interest or other requirements for providing video programming" on direct broadcast satellite ("DBS")

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[1]Time Warner Cable operates numerous cable television systems in various areas across the United States. In addition, an affiliate of Time Warner Cable holds an interest in PRIMESTAR Partners, L.P., a direct-to-home satellite programming service provider. Other affiliates of Time Warner Cable provide programming to multichannel video programming distributors ("MVPDs").

[2]Pub. L. 102-385, 106 Stat. 1460 (1992).

[3]47 U.S.C. § 151 *et seq.*

"providers," including entities that select, package and market programming over DBS facilities.[4]

I. INTRODUCTION.

The Commission, Congress, and DBS providers themselves have recognized that DBS is a direct competitor to traditional cable television service. For example, in its most recent annual report to Congress on competition in the video programming industry, the Commission named DBS as the chief competitor to cable, citing the steady growth in DBS penetration.[5] Indeed, Preston Padden, President of Worldwide Satellite Operations for News

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[4]Section 25(a) of the 1992 Cable Act added Section 335(a) to the Communications Act, which requires that:

> [t]he Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. 47 U.S.C. § 335(a) (emphasis added).

The regulations adopted must, "at a minimum," include certain requirements regarding political broadcasts. In addition,

> [s]uch proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service. Id.

Under Section 25(b) of the 1992 Cable Act, the Commission is required to adopt regulations requiring that DBS providers reserve DBS channel capacity "equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b).

[5]Third Annual Report, CS Docket No. 96-133, FCC 96-265 (released Jan. 2, 1997) at ¶¶ 1, 38.

Corporation Limited ("News Corp."), has called News Corp.'s proposed DBS venture[6] a "wireless overbuild of the entire U.S. cable industry."[7] Mr. Padden went on to boast that SKY will "deploy a cosmic armada unmatched since the Empire Struck Back"[8] and that when SKY begins to retransmit local broadcast signals in the largest Areas of Dominant Influence ("ADIs"), "the cable guys will be calling for Dr. Kevorkian."[9] Sen. John McCain called DBS "perhaps the most potent potential competitor to cable television. . . ."[10]

It is beyond dispute that DBS providers have become direct competitors to cable television and that DBS providers have attempted to design a service which is essentially indistinguishable from cable television service. Moreover, DBS providers are actively seeking to implement technological innovations and are pursuing favorable regulatory and legislative actions, including the ability to retransmit local broadcast stations, in order to further enhance their competitive position. Accordingly, the instant proceeding provides the

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[6]On February 24, 1997, News Corp., an Australian corporation, announced that it had entered into a binding agreement to contribute the assets of ASkyB, a satellite venture with MCI Communications Corporation, for a 50 percent stake in a new joint venture with EchoStar Communications Corporation ("EchoStar") to be called "SKY." SEC Form 8-K, Exhibit A, filed by EchoStar Communications Corporation, as of Mar. 3, 1997. See also Cynthia Littleton, "Murdoch, Ergen take to SKY," Broadcasting & Cable, Mar. 3, 1997, at 41-42.

[7]Cynthia Littleton, "Murdoch, Ergen Take to SKY," Broadcasting & Cable, Mar. 3, 1997, at 41.

[8]Remarks of Preston Padden, Feb. 24, 1997, Los Angeles, CA at 11.

[9]"Call Dr. Kevorkian Time? ASkyB/EchoStar Combination Hovers Over Cable," MultiChannel News, Mar. 3, 1997, at 68.

[10]Hearing on Multichannel Video Competition, Senate Commerce Committee, Apr. 10, 1997.

Commission with a timely opportunity to consider the imposition of public interest obligations on DBS providers equivalent to those required of traditional cable operators.

Since the Commission's "tentative proposal" in 1993 not to adopt public interest obligations for DBS providers beyond the statutory minimum, the competitive landscape has undergone substantial changes and "[t]he DBS industry has grown and changed dramatically."[11] Now that DBS has become the functional equivalent of, and a vibrant competitor to, cable television, the Commission should rethink its 1993 inclination. Instead, with DBS steadily eroding cable subscribership, the Commission can and should undertake a top-to-bottom reevaluation of the plethora of public interest obligations imposed on cable operators. Where it is determined that any such obligation continues to serve a vital public interest, that same obligation must logically be imposed on DBS providers. Conversely, if an obligation is not to be imposed on DBS providers, there is no rational basis for continuing to impose the obligation on cable operators.

II. APPROPRIATE PUBLIC INTEREST OBLIGATIONS SHOULD BE IMPOSED ON DBS PROVIDERS TO PROMOTE REGULATORY PARITY AND LOCALISM.

Section 335 grants the Commission broad powers to impose "public interest or other requirements for providing video programming"[12] on DBS service providers. Moreover, Congress directed the Commission to "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the

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[11] Notice at 1.

[12] 47 U.S.C. § 335(a).

methods by which such principle may be served through technological and other developments in, or regulation of, such service."[13]

In its 1993 Notice of Proposed Rulemaking, the Commission "tentatively proposed" not to adopt additional public service requirements beyond the statutory minimum, based on a flexible regulatory approach taken for DBS and its "early stage of development" at that time.[14] The Commission's recent Notice now asks whether that conclusion remains valid in light of the rapid deployment of the DBS industry over the last several years, including technological advances that will allow DBS providers to offer local programming.[15] Certainly, the minimum requirements imposed by Section 335 -- the political broadcasting requirements of Section 335(a) and the 4-7 percent channel set-aside for noncommercial programming in Section 335(b) -- must apply to all DBS providers, whether or not such providers choose to offer local broadcast stations as part of their programming platform.[16] However, Section 335(a) clearly grants the Commission the discretion to impose additional public interest obligations on all DBS providers.

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[13]Id.

[14]Notice of Proposed Rulemaking in MM Docket No. 93-25, 8 FCC Rcd 1589 (1993) ("DBS Public Interest NPRM") at ¶ 29. The United States Court of Appeals for the District of Columbia Circuit upheld Section 25 of the 1992 Cable Act in Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957, 973-77 (D.C. Cir. 1996), reh'g denied en banc, 105 F.3d 723 (D.C. Cir. 1997).

[15]Notice at 2.

[16]Of course, if there are multiple DBS providers using a single satellite, no more than 7 percent of the satellite's total capacity can be subject to the noncommercial programming set-aside.

In order to properly carry out its mandate to implement Section 335, the Commission should undertake a thorough analysis of the public interest obligations imposed by Federal law or regulation on cable television operators. Upon completion of such review, if the Commission determines that a particular obligation remains essential to advance the public interest, then the Commission must consider the imposition of analogous obligations on DBS providers. On the other hand, if the Commission finds that a particular public interest obligation is unnecessary, DBS providers and cable operators should be equally free to compete, unfettered by such regulatory burdens. Moreover, where any DBS provider seeks the privilege to retransmit local television stations in particular regional areas (*e.g.*, ADIs or Designated Market Areas ("DMAs")), such DBS providers should assume the same regulatory responsibilities attendant on cable operators in connection with the carriage of local broadcast stations. Finally, where a DBS provider implements technology to offer differentiated programming on a regional basis, such DBS providers should shoulder PEG access support obligations analogous to those imposed on cable operators, so as to "advance the principal of localism" under the Communications Act.

A. Competing DBS Providers And Cable Operators Should Be Subject To Equivalent Public Interest Obligations And Regulatory Burdens.

If a DBS provider is to function in much the same manner as a traditional cable operator, then regulatory parity and competitive neutrality dictate that such DBS provider be subject to the same regulatory requirements as a cable operator. Indeed, DBS providers have openly acknowledged that they have designed their business to complete directly with cable television. As SKY Chairman Rupert Murdoch recently testified before Congress:

> When consumers choose between cable and DBS offerings, the choice between them will be between two equivalent

> offerings. . . . All we're asking is to be treated equally with these people [cable operators and broadcasters] in every way. . . . We are not asking for any advantages at all.[17]

It is only fair -- not only to cable operators but to consumers -- that DBS providers should be subject to public interest and other regulatory obligations analogous to those faced by their cable competitors.[18] In order for fair competition to thrive, the Commission must assure that cable operators do not suffer enormous competitive disadvantages through imposition of public interest obligations and other costly regulatory burdens which are not imposed equally on DBS providers. As aptly stated by House Telecommunications Subcommittee Chairman Billy Tauzin:

> [w]hen and if head-to-head competition [between cable and DBS] emerges, there has to be some regulatory parity as well between the two competitors . . . . [P]arity in programming has to be accompanied with parity in regulatory treatment.[19]

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[17]Hearing on Multichannel Video Competition, Senate Commerce Committee, Apr. 10, 1997.

[18]Time Warner Cable has challenged, and reserves its right to continue to challenge, the constitutionality, necessity and propriety of a number of the regulatory requirements applied to traditional cable operators. Nevertheless, Time Warner Cable believes that as long as traditional cable operators remain saddled with numerous regulatory restraints, such obligations must also be imposed on other MVPDs providing comparable service.

[19]Heather Fleming, "SKY Goes to Capitol Hill for Quick Copyright Fix," Broadcasting & Cable, Mar. 17, 1997, at 35-36.

This same theme was echoed by Senators on both sides of the aisle at the recent April 10, 1997 hearing held by the Senate Commerce Committee on video competition:

Sen. McCain (R-AZ):

I'm eager to hear the panel's views on the extent to which rules and laws currently applicable to cable television should also apply to DBS. The issue of regulatory parity has received particular attention in the wake of the Supreme Court's must carry decision. . . . And if some corresponding adjustments can and should be made in the way that cable television is regulated, then the Committee needs to be apprised of where those types of changes would also be beneficial.[20]

Sen. Burns (R-MT):

[E]ntities that engage in similar economic activity should be treated the same. As guided by this rule, regulations must be "competitively neutral," a concept that was embraced by and reflected in the Telecommunications Act of 1996.

* * *

To follow this course, we must compare the public policy obligations that we impose upon satellite delivered broadcast video providers with those currently imposed upon wireline broadcast video providers. If there is a significant difference, which I believe there will be, we must make adjustments. Those adjustments can come in one of two forms:

-- the imposition of obligations on satellite providers comparable to those currently imposed upon wireline providers; or

-- the reduction of obligations currently placed upon wireline providers.

* * *

Fair competition, competitively neutral, that's what we have to keep in mind.[21]

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[20]Hearing on Multichannel Video Competition, Senate Commerce Committee, Apr. 10, 1997.

[21]Id.

Sen. Wyden (D-OR):

> It seems to me that we have to make sure that those who ask for rights and particularly opportunity to deliver the new services also have to be charged with responsibilities. I am very troubled about the prospect that, as this debate goes forward, that there are some that would in effect like to cherry pick the crown jewels of the communications sector without exercising some of the responsibilities; responsibilities, for example, with respect to public interest requirements, and must carry requirements, and PEG requirements, and the variety of other issues with respect to responsibilities.
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> * * *
>
> As Ronald Reagan said, trust but verify . . . . If there's going to be a change in the copyright statute, I will tell you I'm going to look very, very carefully at those details to make sure that there really is parity.[22]

Sen. Kerry (D-MA):

> How do we guarantee that we're not creating a situation where we're transferring from one dominant market to another, conceivably, absent some sort of regulatory parity?[23]

The Commission's open video system ("OVS") rules clearly illustrate how competing similar services should be treated with regulatory parity. Like DBS, OVS was intended to provide increased multichannel video programming distribution competition. According to the legislative history of Section 653 of the Telecommunications Act of 1996 ("1996 Act"),[24] which established the OVS option, "the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition

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[22]Id.

[23]Id.

[24]Pub. L. 104-104, 110 Stat. 56 (1996).

in entertainment and information markets."[25] Therefore, OVS operators or programmers are subject to numerous Title VI provisions, including public, educational and governmental ("PEG") access[26] and payments to localities in lieu of cable franchise fees, as well as relevant FCC cable television rules, including must-carry, sports blackout, network nonduplication and syndicated exclusivity obligations.[27] The 1996 Act also subjects OVS operators to non-discrimination requirements regarding their programmer-customers, as well as channel occupancy limits where channel capacity demand exceeds supply.[28] These requirements are similar to the 1992 Cable Act's anti-discrimination provisions, including the program access provisions now contained in Section 628 of the Communications Act.[29] Quite obviously, therefore, Congress believed that OVS' designation as a competitor to cable must be accompanied by a level of regulatory parity with cable. There is no reason why DBS providers should be treated differently.

Accordingly, consistent with its mandate under Section 335 of the Communications Act, the Commission should either impose the public interest and other obligations on DBS

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[25]H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996). See also Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, 3 Communications Reg. (P&F) 196 (1996) ("OVS Second Report and Order") at ¶¶ 2, 24 ("[t]he underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator") (footnote omitted).

[26]47 U.S.C. § 573(c)(1)(B).

[27]47 U.S.C. § 573(b)(1)(D).

[28]47 U.S.C. §§ 573(b)(1)(A)-(B).

[29]47 U.S.C. § 548.

service providers as more fully described below, or take steps to relieve cable operators of such requirements.[30]

1. Access to Programming.

Section 628 of the Communications Act,[31] as amended by the 1992 Cable Act and the 1996 Act, imposes "access to programming" requirements on vertically integrated satellite cable programming vendors and satellite broadcast programming vendors. These requirements include the obligation to make such satellite cable programming and satellite broadcast programming available to competing multichannel distributors on nondiscriminatory terms and conditions.[32] Vertically integrated programmers also are generally prohibited from entering into exclusive agreements that prevent a MVPD from obtaining access to such programming.[33]

Time Warner Cable opposed the adoption of Section 628 in 1992 on the grounds that vertical integration and the ability to enter into exclusive contracts can be economically beneficial, creating incentives for increased investment in programming. While recognizing that vertical integration and exclusive contracts were not *per se* undesirable, Congress nonetheless concluded that the risks that vertically integrated program vendors would discriminate among MVPDs in an attempt to favor one over the other warranted the imposition of access to programming requirements on programming vendors in which a cable

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[30]Compare Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (FCC required to fully explain disparate treatment of similarly-situated applicants).

[31]47 U.S.C. § 548.

[32]47 U.S.C. § 548(c)(2)(B).

[33]47 U.S.C. § 548(c)(2)(C).

operator had an attributable ownership interest. Moreover, in 1996, Congress extended these requirements to programming vendors that are vertically integrated with any common carrier providing video programming directly to subscribers, through OVS or any other means.[34]

The extension of access to programming requirements to common carriers entering the video distribution market (and to OVS operators in particular) confirms Congressional intent that the public interest concerns underlying the imposition of such requirements be triggered by the fact of vertical integration between a satellite programming vendor and a multichannel distributor, and that it does not matter whether the distributor is a relatively new entrant in the market, such as DBS, or an established participant, such as cable.[35] Moreover, the risk that vertically integrated DBS providers will attempt to deny competitors access to programming created by affiliated entities is not merely conjectural. For example, News Corp. has indicated that SKY will seek to take full advantage of the News Corp. proprietary program product. In a speech delivered earlier this year, Preston Padden, News Corp.'s President of Worldwide Satellite Operations, spelled out SKY's business plan as follows:

> Perhaps the biggest advantage of being part of the News Corp. family is our access to News Corp. proprietary program content from around the world. Our new platform will be part of the corporate family that includes Twentieth Century Fox Film Corporation, Fox Broadcasting Network, Fox Sports, Fox Children's Network, the Fox Net Regional Sports Channels,

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[34]47 U.S.C. § 548(j), added by the 1996 Act. See also 47 U.S.C. § 573(c) (OVS provision).

[35]"[O]ne of Congress' primary concerns underlying the program access provisions was that cable operators (and now open video system operators) may use their ownership of or vertical integration with satellite programmers to exclude competitors from access to their programming." OVS Second Report and Order, *supra*, at ¶ 177.

> Fox News and all of the global networks and program services on display at this conference today. Most importantly, all of this content can never be taken away from us by vertically integrated competitors. (Emphasis added.)[36]

Mr. Padden went on to note that, as an outgrowth of News Corp.'s "exclusive relationship" with TVGuide (which is owned by News Corp.), "SKY will be the only television service with a TVGuide branded electronic program guide" (emphasis in original).[37]

The authority granted to the Commission by Section 335 of the Communications Act to impose on DBS "public interest or other requirements for providing video programming" clearly empowers the Commission to take such actions as are necessary to ensure that programmers vertically integrated with a DBS provider cannot deny competitors access to "satellite cable programming" or otherwise discriminate in the terms and conditions by which such programming is made available. In particular, the Commission can and should impose on programmers that are vertically integrated with a DBS provider access to programming requirements identical to those imposed on other vertically integrated multichannel distribution platforms. Furthermore, in the absence of a DBS/broadcast cross-ownership limitation comparable to the current cable/broadcast cross-ownership prohibition, the rules adopted by the Commission should go beyond the current prohibition on exclusive retransmission consent contracts[38] and prohibit broadcasters that are vertically integrated with a DBS provider from unilaterally refusing to grant retransmission consent to competing

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[36]Remarks of Preston Padden, Feb. 24, 1997, Los Angeles, CA at 9.

[37]Id.

[38]47 C.F.R. § 76.64(m).

distributors or from unfairly discriminating in the terms and conditions of such retransmission consent.[39]

2. Channel Occupancy Limits.

Pursuant to Section 11 of the 1992 Cable Act, the Commission has established limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest.[40] The very same concerns that prompted Congress and the Commission to impose these channel occupancy restrictions on cable operators, *i.e.*, overt favoritism by a MVPD through carriage of affiliated programmers at the expense of unaffiliated programmers, demand that these rules also be applied to vertically integrated DBS providers and their affiliated programmers.

To the extent any of the concerns which led Congress to establish channel occupancy limits for vertically integrated cable operators are valid, which we dispute, they are no less relevant in the DBS context.[41] As detailed above, the DBS industry is becoming increasingly vertically integrated. The potential for vertically integrated DBS operators to favor affiliated video programming services is just as great as for vertically integrated cable operators. Indeed, DBS providers have much greater power over programmers than even the

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[39]The FCC rules generally prohibit a MVPD from retransmitting the signal of any commercial TV station without its express authority. 47 C.F.R. § 76.64(a). TV stations are prohibited from making a carriage agreement with one MVPD to the exclusion of other MVPDs. 47 C.F.R. § 76.64(m). Under the current rules, a TV broadcaster could, however, discriminate against unaffiliated MVPDs by requiring payments in exchange for retransmission consent or other burdens not imposed on an affiliated MVPD in the same ADI.

[40]See 47 U.S.C. § 533(f)(1)(B); 47 C.F.R. § 76.504.

[41]See *e.g.*, H.R. Rep. No. 628, 102d Cong., 2d Sess. 43 (1992); S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1992).

largest cable operators, because a programmer able to secure carriage by a DBS provider is able to instantly blanket its signal nationwide, whereas programming services can only be carried by cable operators on a system-by-system basis, as channel capacity allows, even where a programmer has negotiated a "master" affiliation agreement with a cable multiple system operator. It is well within the public interest mandate of Section 335 of the Communications Act to ensure that programmers unaffiliated with the DBS provider have access to DBS systems. Accordingly, the public interest demands that the Commission impose channel occupancy requirements on DBS providers equivalent to those imposed on cable systems.

3. Leased Access.

Section 612(b)(1) of the Communications Act mandates that cable operators set aside between 10 and 15 percent of their channels, depending on the number of activated channels, "for commercial use by persons unaffiliated with the operator."[42] As long as such requirements apply to cable operators, they should also be applied to DBS providers as a public interest requirement.

Congress' stated policy rationale for the leased access requirement was to bring about "the widest possible diversity of information sources" for cable subscribers.[43] According to the legislative history of the Cable Communications Policy Act of 1984 ("1984 Cable Act"),[44] "cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering provides

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[42]47 U.S.C. § 532(b)(1).

[43]47 U.S.C. § 532(a).

[44]Pub. L. 98-549, 98 Stat. 2779 (1984).

programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system."[45] This concern is just as acute with regard to DBS. While Time Warner Cable does not concede that Congressional concerns in establishing the leased access requirements were valid, it nevertheless seems evident that DBS providers have the same ability and incentive as their cable competitors to suppress programming representing diverse viewpoints. Accordingly, such DBS providers should also be subject to the Communications Act's leased access requirements.

In fact, the policies behind the leased access requirement apply with even greater force to any DBS provider who controls the majority of full-CONUS DBS transponders.[46] For example, SKY has announced that it intends to control over 52 percent of available full-CONUS DBS channels upon completion of its agreement with EchoStar.[47] This scenario raises the specter of control over programming to a much greater degree than the thousands of local cable systems, which are limited in reach to their franchise areas. Without leased access requirements, under Congress' analysis, a dominant DBS provider such as SKY could blanket the entire continental United States with its own programming, keeping competing voices at bay. Therefore, it is not only fair from a regulatory parity standpoint, but crucial under Congress' "diversity of programming voices" rationale, that DBS providers should be

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[45]H.R. Rep. No. 934, 98th Cong., 2d Sess. 48 (1984).

[46]Full-CONUS satellites are those which cover the entire continental United States.

[47]See, *e.g.*, "EchoStar Eyes D-VHS Deal With JVC, Plans Local Programming," Communications Daily, Mar. 31, 1997, at 3-4; Rebecca Cantwell, "Star Wars," Rocky Mountain News, Mar. 3, 1997, at 1B; Cynthia Littleton, "Murdoch, Ergen Take To Sky," Broadcasting & Cable, Mar. 3, 1997, at 41.

subject to the same leased access obligations imposed upon their cable competitors, including the 10 to 15 percent capacity set-aside.[48] Naturally, such obligations should be tailored in accordance with the scope of service offered by a particular DBS provider. Where a uniform DBS channel line-up is delivered nationwide, the DBS provider should only be required to accommodate channel lessees seeking national distribution. DBS providers which elect to customize their offerings in particular regional service areas, *e.g.*, through the retransmission of local broadcast signals, should be similarly required to offer leased access channel capacity on a regional basis.

4. Regulation of Carriage Agreements.

In accordance with Section 616 of the Communications Act, the Commission has adopted regulations designed, *inter alia*, to prevent any "cable operator or other multichannel video programming distributor" from either requiring a financial interest in a program service as a condition for carriage, or coercing a video programming vendor to provide exclusive rights against other MVPDs as a condition of carriage.[49] In accordance with express Congressional directives, the Commission's rules to implement Section 616 of the Communications Act apply to cable operators as well as any other "multichannel video programming distributor." Thus, Section 76.1300(c) of the Commission's rules broadly

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[48]Time Warner Cable notes that, as explained in Section II.C. below, the 4-7 percent of channel capacity public interest set-aside for DBS is akin to cable's PEG access obligations, and thus should not be used to limit DBS providers' leased access obligations to less than cable's 10 to 15 percent requirement.

[49]See In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565 (1993).

defines the term "multichannel video programming distributor" to include DBS.[50] In any situation where the DBS provider is unaffiliated with the DBS licensee, the carriage agreement provisions contained in Section 76.1300 *et seq.* of the Commission's rules would logically apply only to the DBS provider, not the licensee. As the entity which selects the programming services to be included in a DBS package to be offered to consumers, and which attempts to negotiate for exclusive distribution arrangements, it is the DBS provider alone who is in a position to engage in the kinds of practices which Section 616 of the Communications Act was designed to prohibit. The implicit recognition of this fact by the Commission in its "multichannel video programming distributor" definition contained in Section 76.1300(c) of the rules is yet another indication of the validity of the discussion in Section III of these comments regarding the proper scope of Section 335.

5. Other Regulatory Obligations Imposed On Cable Operators.

As the Commission carries out its responsibility to implement Section 335, it should undertake an exhaustive review of other public interest responsibilities and regulatory burdens imposed on cable operators, and either promulgate analogous requirements for DBS providers or relieve cable operators from such obligations. Among the issues which should be reevaluated are regulations relating to negative option billing practices,[51] anti-buy-

[50] 47 C.F.R. § 76.1300(c).

[51] 47 U.S.C. § 543(f).